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No. 90-1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHEILA JACKSON STOSSIER,
Petitioner,

v.

GERHARD SIMON STOSSIER,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Virginia

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BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Gerhard Stossier submits this brief in opposition to the petition for a writ of certiorari filed by Sheila Stossier, his ex-wife. The decision below—an unpublished ruling of the Virginia Court of Appeals arising out of a routine child custody dispute—applied the jurisdictional provisions of the Parental Kidnapping Prevention Act to an unusual set of facts and reached an outcome that was neither wrong nor inconsistent with rulings in other states. Moreover, even if this Court were to reverse that decision, subsequent events make it very likely that the very same judgment would ultimately be reinstated. For these reasons, the case clearly does not warrant further review.

STATEMENT

Petitioner and respondent were married and living together with their daughter in Virginia until July 1986, when respondent moved to the District of Columbia and petitioner filed a divorce action in a Virginia circuit court. A consent order granted temporary custody of the child to petitioner in September 1986, and she moved with her daughter to the District of Columbia in November 1986. During the following months, petitioner was found in contempt of court repeatedly for willful failure to cooperate with the visitation rights of respondent.

On December 23, 1987, the circuit court entered a final decree of divorce and granted continued custody of the daughter to petitioner. J.A. 15.[1] Because of petitioner's previous behavior, however, the court stated that the custody determination would be further reviewed on June 8, 1988, and the case was retained on the docket. J.A. 19-20. In June, respondent renewed his request for custody in the circuit court. J.A. 22. Before that motion was brought on for hearing, the parties agreed to participate in the circuit court's mediation program. J.A. 23.

On August 3, 1988, petitioner filed an action in D.C. Superior Court seeking an increase in her child support payments. Respondent, in turn, scheduled his custody motion for hearing in the Virginia circuit court on September 28, 1988. J.A. 28. After some additional delays, on December 5, 1988, the circuit court conducted an evidentiary hearing on the custody issue. Based on testimony and a report from a guardian *ad litem*, the circuit court on December 19, 1988, directed respondent to prepare an order granting permanent custody to him. J.A. 66. That same day, the D.C. Superior Court entered an order indicating that it would "abstain" from hear-

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[1] "J.A." cites are to the joint appendix in the Virginia Court of Appeals.

ing the matter in light of the pending Virginia action and dismissing the action without prejudice on that basis.

It was only in January 1989 that petitioner, having lost on the merits of the custody issue, for the first time raised the issue of jurisdiction in the Virginia circuit court. Her motion to dismiss *nunc pro tunc* was denied, and the court entered an order awarding custody to respondent on January 11, 1989. J.A. 71.

Petitioner appealed to the Virginia Court of Appeals,[2] which affirmed in an unpublished opinion. In the final paragraph of that opinion, the court relied on three facts: (1) the Virginia circuit court had valid jurisdiction at the time the action was filed, (2) the action remained ongoing continuously in the Virginia courts until January 1989 since the court's previous custody orders had all been expressly provisional, and (3) the D.C. Superior Court had declined jurisdiction over the matter. *See* Pet. App. 3a. Based on these facts, the court held that Section 8 of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, did not bar the circuit court from making a custody determination even though all parties had previously left the state. The Virginia Supreme Court dismissed a subsequent petition for appeal.

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[2] In the meantime, petitioner refused to turn over custody of her daughter until the circuit court had her arrested for willful defiance of its decision.

ARGUMENT

This case does not warrant further review for three reasons. First, the Virginia Court of Appeals did not adopt the reading of the PKPA alleged by petitioner when it approved retention of jurisdiction in the unusual circumstances presented here. Second, for that and other reasons, it is untenable to suggest that this case creates a serious conflict among the state courts requiring resolution by this Court. Finally, since respondent and the daughter have now returned to Virginia and petitioner has moved to Maryland, even a reversal in this Court would, in all likelihood, lead to a decision by the Virginia courts to retain jurisdiction and reinstate the existing custody order.

1. Petitioner's entire argument construes the ruling below as a holding that, once a custody proceeding is over and has resulted in a custody order, the court that entered that order may entertain a motion to modify even after all parties have moved from the jurisdiction. Pet. 6. But that is not what the Virginia courts held. Petitioner's argument simply ignores the significance of the key facts relied on by the Virginia Court of Appeals.

In that court, this case was not seen as involving jurisdiction to entertain a new challenge to a facially final, unconditional custody determination. The court below emphasized that Virginia, as the then-current residence of petitioner and her daughter, had undisputed jurisdiction over this custody proceeding at the time it was initiated in 1986. Pet. App. 3a.[3] It then recognized that the December 23, 1987 order granting custody to petitioner by its terms "did not dismiss the case but continued it for further proceedings." *Id.* Those "further

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[3] *See* 28 U.S.C. § 1738A(c)(2)(A) (court may make child-custody determination if in a state that was "the home state of the child *on the date of the commencement of the proceeding*") (emphasis added).

proceedings," of course, were the pre-scheduled six-month review of the custody issue that ultimately led to the final award of custody to respondent. In sum, the court below viewed the case as involving a single, ongoing proceeding extending from 1986 to 1989.

The Virginia circuit court's retention of jurisdiction in these circumstances did not, contrary to petitioner's claim, contravene section 8(d) of the PKPA, 28 U.S.C. § 1738A (d). That section provides that the jurisdiction of a court of a state that "has made a child custody determination . . . continues as long as . . . such State remains the residence of the child or of any contestant." *Id.* The provision is reasonably read not to come into play until *after* the court has made a final custody determination. Indeed, even petitioner apparently would concede that the PKPA allows a court, once vested with valid jurisdiction, to arrive at a final determination about custody—despite the fact that all parties may leave the state in the interim.[4] In this case, as we have noted, there was a single continuous proceeding that did not culminate in a final custody determination until January 1989.

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[4] After all, petitioner's claim is premised on the December 23, 1987 granting custody to her, which itself came more than a year after all parties had left Virginia.

The alternative interpretation—that Section 8(d) cuts off jurisdiction in the midst of a proceeding the instant the last party moves out of state—would make no sense. Subsection (d) only comes into play *after* a court "has made a child custody determination." It cannot, therefore, support a universal requirement of current party residence throughout every proceeding. Moreover, such a rule would empower the last party in residence in a state, during a proceeding, to manipulate jurisdiction to his or her advantage. The party could stay in residence as long as the court was favorably inclined but leave and cut off jurisdiction—even in the midst of a hearing—if matters took a negative turn. Such interstate movement for litigation-related reasons was one of the evils Congress sought to prevent through the PKPA. *See* Pet. App. 11a-13a (Congressional findings and declaration of purposes).

These facts obviously distinguish this case from the cases from other states cited by petitioner. Those cases exemplify the far more usual situation where a final custody order is entered, and a new action for modification is initiated in the same court years later.[5] In such a case, under 28 U.S.C. § 1738A(d), the court's power to entertain the modification action cannot derive from a theory of continued jurisdiction over the original decree, if all parties have since left the state.

Nothing in the decision below suggests that Virginia courts would disregard this clear rule on the same facts. The court below simply saw this case as falling in a different category—the category of a validly initiated, continuous proceeding that did not reach a final resolution until the custody award to respondent. That decision —about the proper treatment under the PKPA of the unusual facts presented here—clearly does not merit this Court's review.

Furthermore, the court below suggested an alternative jurisdictional basis that petitioner mentions only in passing. The court noted that the D.C. Superior Court "declined to exercise jurisdiction because of the pendency of the proceeding in Virginia." Pet. App. 3a. Section 8(c)(2)(D) of the PKPA, 28 U.S.C. § 1738A(c)(2)(D), authorizes a state court to make a child-custody determination when "another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum . . . and . . . it is in the best interest of the child that such court assume jurisdiction." This basis of jurisdiction is unaffected by

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[5] *See Dahlen v. Dahlen*, 393 N.W.2d 765 (N.D. 1986); *Long v. Long*, 439 N.W.2d 523 (N.D. 1989). The third case cited as conflicting by petitioner—*Yurgel v. Yurgel*, 15 Fla. L. Weekly S566 (Fla. Nov. 2, 1990)—is totally irrelevant. It did not involve an interpretation of the PKPA and did not even involve a situation where all parties left the state.

the parties' residence.[6] And, although the D.C. Superior Court did not expressly determine that Virginia was a "more appropriate forum," it certainly so implied.[7] The holding that jurisdiction was proper here thus had a second basis—independent of petitioner's Section 8(d) challenge.

2. The absence of error in the decision below is reason enough to deny the petition. Certainly this case is not of general importance. The opinion below was unpublished and bore a stamp indicating that it "is not to be cited or relied upon in the future." This alone means that any purported error in the opinion, or resulting "conflict," is not a matter of general concern.[8]

Finally, and in any event, the jurisdictional issue in this case is itself largely academic. It is a matter of record that petitioner has now moved to the State of Maryland and that respondent and his daughter have returned their residence to Virginia.[9] Thus, even if this Court were to reach the merits and vacate the custody order at issue here, it appears that only Virginia would have

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[6] If Section 8(c)(2)(D) was satisfied at the time the court granted custody to respondent, the residency of the parties at that stage was irrelevant. The residency requirement in Section 8(d) applies by its terms only to the extent that a court is relying on "continuing" jurisdiction over a prior decree.

[7] There can be no doubt that, as of December 19, 1988, the Virginia court was the more appropriate forum, from all standpoints including that of the daughter. The court was intimately familiar with the parties and the relevant circumstances by the virtue of the fact that all parties had been litigating in that court continuously without objection for more than two years.

[8] Petitioner does not even suggest a conflict, independent of the decision below, warranting this Court's attention.

[9] *See, e.g.*, Order of November 30, 1990, Chancery No. 17026 (Va. Cir. Ct.) (indicating parties' current addresses).

jurisdiction to enter any further custody decree.[10] In all likelihood, the case would return to the same Virginia circuit court, which would then reinstate the now-prevailing custody arrangement. These facts, even if they do not make the present petition technically moot, certainly suggest that there would be little point in further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] Under the PKPA, 28 U.S.C. § 1738A(c)(2), the District would have lost any basis for exercising jurisdiction and Maryland would not have any. Virginia, as the current "home state" of the child, would have jurisdiction.